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The Three Phases of *Mead*

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THE THREE PHASES OF *MEAD*

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O, swear not by the moon, the inconstant moon,
That monthly changes in her circle orb,
Lest that thy love prove likewise variable.[1]

Though this be madness, yet there is method in't.[2]

INTRODUCTION

No symposium entitled "*Chevron* at 30" would be complete without some consideration of the U.S. Supreme Court's subsequent decision in *United States v. Mead Corp*.[3] As Thomas Merrill and I documented years ago, in the years leading up to *Mead*, courts were in substantial disarray over which agencies and actions were eligible for *Chevron*'s requirement of strong, mandatory deference.[4] Some disagreements concerned the nature and scope of agency authority. For example, the federal circuit courts were divided over whether an agency that lacked the power to adopt legislative rules could claim *Chevron* deference for its statutory interpretations.[5] Other questions focused on the formats agencies used to communicate their interpretations. Regulations adopted through notice-and-comment rulemaking seemed obviously *Chevron*-eligible, as *Chevron* itself concerned such a rule.[6] Courts were less clear, however, about the eligibility for *Chevron* review of agency adjudications or rules that lacked

* Harlan Albert Rogers Professor of Law, University of Minnesota Law School. I am grateful to participants at the Chevron *at 30: Looking Back and Looking Forward* Symposium held at Fordham University School of Law and the University of Minnesota Law School's Squaretable speaker series for helpful feedback, and also to Caitlinrose Fisher and Peter Graham for research assistance. Thank you also to Peter Shane, Chris Walker, and the *Fordham Law Review* for organizing and hosting the symposium.

1. WILLIAM SHAKESPEARE, ROMEO & JULIET act 2, sc. 2.
2. WILLIAM SHAKESPEARE, HAMLET act 2, sc. 2.
3. 533 U.S. 218 (2001). For an overview of the symposium, see Peter M. Shane & Christopher J. Walker, *Foreword:* Chevron *at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475 (2014).
4. Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833 (2001).
5. *Id.* at 849 n.83 (documenting the circuit split).
6. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

notice and comment procedures, like proposed rules, interpretative rules, or interim rules.[7]

Also, for many years after *Chevron*, it was not altogether clear whether the *Chevron* standard of review had wiped out preexisting judicial deference standards. A few years ago, William Eskridge and Lauren Baer empirically demonstrated that the Court did not in fact abandon other deference standards after *Chevron*.[8] But Justice Scalia had labeled the Court's pre-*Chevron* deference cases anachronistic,[9] and some scholars seemed inclined to agree.[10]

Mead at least partly resolved these issues by declaring *Chevron*'s reach to be limited, both by identifying congressional delegation as the premise guiding *Chevron*'s scope and by unequivocally resurrecting the standard of review articulated in *Skidmore v. Swift & Co.*[11] as the alternative where *Chevron* does not apply.[12] Yet for many courts and commentators, *Mead* has proven just as confusing and controversial as *Chevron*. As the sole dissenter in *Mead*, Justice Scalia has never liked its holding, railing against it in opinion after opinion.[13] Scholars have criticized *Mead* and its progeny as "unfortunate," "flawed," and "incoherent";[14] a "mess";[15] "complicated," "unclear," and "prone to results-oriented manipulation."[16]

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7. Merrill & Hickman, *supra* note 4, at 849–52 (listing fourteen areas of pre-*Mead* judicial disagreement, inconsistency, and confusion regarding *Chevron*'s scope).

8. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008).

9. Although Justice Scalia is perhaps best known for making this declaration in his concurring opinion in *Christensen v. Harris County*, 529 U.S. 576, 589 (2000) (Scalia, J., concurring), he actually expressed similar thoughts much, much earlier. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 259–60 (1991) (Scalia, J., concurring); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (declaring that *Chevron* replaced preexisting deference standards with "an across-the-board presumption that, in the case of ambiguity, agency discretion is meant").

10. *See, e.g.*, Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station*, 1990 DUKE L.J. 984, 1024 (declaring that *Chevron* "swept aside" existing factors "for determining the extent of deference").

11. 323 U.S. 134 (1944).

12. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

13. *See, e.g.*, *id.* at 261 (Scalia, J., dissenting) (predicting that *Mead*'s "consequences will be enormous, and almost uniformly bad"); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1018 (2005) (Scalia, J., dissenting) (declaring that *Mead* and *Brand X* both "create[] many uncertainties to bedevil the lower courts"); United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1847 (2012) (Scalia, J., concurring in part and concurring in judgment) (continuing to criticize the line of jurisprudence including *Mead* and *Brand X* for "creat[ing] confusion and uncertainty").

14. Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347, 347 (2003) (considering D.C. Circuit decisions in the term immediately following *Mead*).

15. Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1444 (2005) (examining court of appeals decisions applying *Mead* and concluding that Justice Scalia "actually understated the effect of *Mead*").

16. Amy Wildermuth, *What* Twombly *and* Mead *Have in Common*, 102 NW. U. L. REV. COLLOQUY 276, 277–78 (2008). In this symposium, a number of contributors continue this debate about *Mead* and *Chevron* Step Zero. *See, e.g.*, Jack M. Beermann, Chevron *at the Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 731, 741–43 (2014); Thomas W. Merrill, *Step Zero After* City of Arlington, 83 FORDHAM L. REV. 753,

Some are critical of *Mead* because they believe it to be premised on a fiction that Congress actually thinks about judicial deference in drafting statutes.[17] More recent empirical research by Lisa Bressman and Abbe Gluck suggests that the practices and intentions of congressional staffers charged with drafting legislation strongly support the intuitions driving *Mead* as well as *Chevron*—that Congress often but does not always intend to delegate primary interpretive responsibility to administering agencies rather than courts.[18]

Separately, courts and scholars have struggled with *Mead*'s application at times, for a couple of reasons. After initially articulating a relatively rule-like two-part test for determining the scope of *Chevron*'s applicability, the *Mead* Court waffled over which agency actions would or would not satisfy that test—an equivocation that was simply destined to yield disagreement, particularly as the lower courts endeavored to apply *Mead* across a variety of circumstances.[19] Subsequently, the Court's rhetoric about *Mead* has been inconsistent, sowing confusion and raising doubts about the Court's enduring commitment to *Mead* and its theoretical underpinnings.[20]

Stepping back, however, two aspects of the Court's *Mead* jurisprudence explain much of the difficulty. First, as Thomas Merrill has observed, *Mead*, *Chevron*, and *Skidmore* are meta-standards, meaning that the justices can disagree over how these standards work or even which to apply but still agree to accept or reject an agency's particular statutory interpretation in a given case.[21] While commentators may analyze and critique every snippet

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756–58 (2014); Peter L. Strauss, *In Search of* Skidmore, 83 FORDHAM L. REV. 789, 792–93 (2014).

17. *See, e.g.*, Michael Healy, *Spurious Interpretation Redux:* Mead *and the Shrinking Domain of Statutory Ambiguity*, 54 ADMIN. L. REV. 673, 679–80 (2002) ("Can we reasonably believe Congress intended varied levels of deference should be accorded to administrative decisions on the basis of the indeterminate, inconsistent, and ambiguous factors weighed by the Court in deciding Congress did not intend to accord *Chevron* deference to the Customs Service in its customs rulings?").

18. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 994 (2013). Professor Gluck explores the implications of these empirical findings further in her contribution to this symposium. Abbe R. Gluck, *What 30 Years of* Chevron *Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 619 (2014). And, another symposium contribution documents how Congress deliberately codified a deference regime different from *Chevron* in at least once instance. Kent Barnett, *Improving Agencies' Preemption Expertise with* Chevmore *Codification*, 83 FORDHAM L. REV. 587 (2014) (detailing how in the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 25b(5)(A) (2012), Congress directed courts to review under the *Skidmore* standard any decision to preempt state law made by the Office of the Comptroller of the Currency).

19. United States v. Mead Corp., 533 U.S. 218, 230–31 (2001) ("Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication. That said . . . the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.").

20. *See supra* notes 14–16 and accompanying text; *infra* Part II.

21. Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 812–13 (2002).

of rhetoric, the justices may be more willing to let minor disagreements over dicta go unremarked, rather than write separately over every questionable turn of phrase.[22] Some of the justices seem profoundly uninterested in the theoretical nuances of deference doctrine, which admittedly sometimes resemble the old debate over how many angels can dance on the head of a pin. In many cases, minor rhetorical tweaks and blurred language may be enough to persuade even justices who are more interested in the deference doctrine debate to join opinions in favor of outcomes with which they agree.[23]

Second, and relatedly, *Mead*'*s* eight-to-one breakdown masked tremendous disagreement among the justices regarding the relationship between *Mead*, *Chevron*, and *Skidmore*. As the sole dissenter in *Mead*, Justice Scalia has always disdained the Court's holding in that case and advocated a *Chevron*-or-nothing approach to judicial deference. But the remaining justices, all of whom purport to follow *Mead*, are not of one mind. Opinions written by Justices Thomas, Scalia, and Breyer in *Mead*'s precursor, *Christensen v. Harris County*,[24] clearly articulated three rather than two distinct approaches to *Chevron*'s scope.[25] Justice Souter's mushier rhetoric in *Mead* temporarily papered over much of that divide. Beginning in the following term with *Barnhart v. Walton*,[26] however, the Court's post-*Mead* jurisprudence reflects the same three-way split exhibited in *Christensen*.

In this Essay, I explore the three different views of the relationship between *Mead*, *Chevron*, and *Skidmore* expressed in the Court's *Mead* jurisprudence. The Court's rhetoric cycles among these three views, shifting particularly between the Thomas and Breyer views, but occasionally reflecting aspects of Justice Scalia's approach as well, causing tremendous confusion about *Mead*'s theoretical parameters. Yet one of these three views, which I refer to as the "decision tree model," seems most prevalent, both at the Supreme Court and, perhaps more significantly, at the federal circuit court level. Overall, the decision tree model, as applied, seems to resolve most cases fairly predictably—hence why I think it dominates and also makes *Mead* more workable than its critics suggest. The decision tree model is not doctrinally precise, however, and in more marginal cases, it is clunky. In such cases, the more fluid approach advocated by Justice Breyer may yield more satisfying outcomes, but at the

22. *See, e.g.*, Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3 (2010) ("[A] Justice, contemplating publication of a separate writing, should always ask herself: Is this dissent or concurrence really necessary?"); *cf.* Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1412–15 (1995) (discussing reasons why judges write concurring or dissenting opinions).

23. *Cf.* Wald, *supra* note 22, at 1377–80 (discussing ways in which judges negotiate the rhetoric of judicial opinions to accommodate one another).

24. 529 U.S. 576 (2000).

25. *See id.*; *see also* Thomas W. Merrill, *Judicial Deference to Agency Action*, 9 ENGAGE: J. FEDERALIST SOC'Y PRAC. GRPS. 16, 18–19 (2008) (drawing three rather than two distinct views of *Chevron*'s scope from opinions written by Justices Thomas, Scalia, and Breyer in *Christensen*).

26. 535 U.S. 212 (2002).

price of the decision tree's predictability. Regardless, recognizing the three phases of *Mead* may help litigants shape their arguments and allow commentators to better predict case outcomes.

I. A TRILOGY: *CHRISTENSEN*, *MEAD*, AND *BARNHART*

As indicated, understanding *Mead*'s aftermath requires viewing *Mead* not in isolation but as part of a trilogy of cases consisting of *Mead*, *Christensen v. Harris County*, and *Barnhart v. Walton*. While less prominent than *Mead*, both *Christensen* and *Barnhart* significantly influence *Mead*'s application. To set up the forthcoming analysis, a review of all three cases seems warranted.

Christensen[27] represented the Court's initial stab at recognizing that there might be significant questions regarding the scope of *Chevron*'s applicability. *Christensen* concerned an interpretation of the Fair Labor Standards Act advanced by the Acting Administrator of the Department of Labor's Wage and Hour Division, first in an opinion letter to the respondent and subsequently in an amicus brief to the Court signed by the Solicitor of Labor.[28] *Christensen* concerned the same statute and agency as *Skidmore*,[29] and thus represented a particularly interesting vehicle for addressing the continued vitality of the *Skidmore* standard of review.

Writing for a majority of six, Justice Thomas recognized that the statute was silent on the particular issue at hand but employed textual canons to conclude that Harris County's interpretation rather than the Department of Labor's was "the better reading" of the statute.[30] From there, however, the Court fractured a little further. Writing now for a bare majority of five, Justice Thomas proceeded to comment on the question of deference for the Department of Labor's opinion letter. According to Justice Thomas, as opposed to notice-and-comment regulations or formal adjudications, interpretations advanced in opinion letters, policy statements, agency manuals, and enforcement guidelines "lack the force of law" and "do not warrant *Chevron*-style deference."[31] "Instead, interpretations contained in formats such as opinion letters are 'entitled to respect' under" *Skidmore*.[32]

Writing separately, Justice Scalia objected to Justice Thomas's assertion of *Skidmore* as a valid standard of review.[33] Justice Scalia called *Skidmore* "an anachronism, dating from an era in which we declined to give agency interpretations (including interpretive regulations, as opposed to legislative rules) authoritative effect."[34] Instead, while agreeing with Justice Thomas as to the better reading of the statute and thus the judgment, Justice Scalia

27. 529 U.S. 576 (2000).

28. *Id.* at 581; *see also* Brief for the United States As Amicus Curiae Supporting Petitioners, *Christensen*, 529 U.S. 576 (No. 98-1167).

29. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

30. *Christensen*, 529 U.S. at 585.

31. *Id.* at 587.

32. *Id.*

33. *Id.* at 589 (Scalia, J., concurring in part and concurring in judgment).

34. *Id.*

nevertheless described the combination of an opinion letter and an amicus brief signed by the Solicitor of Labor as "the authoritative view of the Department of Labor," and thus eligible for review if not deference under the *Chevron* standard.[35]

Lastly, Justice Breyer, representing the views of the three dissenting justices,[36] agreed with Justice Scalia that the agency's interpretation was "authoritative" and arguably worthy of *Chevron* deference.[37] On the other hand, Justice Breyer disagreed with Justice Scalia's characterization of *Skidmore*. According to Justice Breyer, "*Chevron* made no relevant change" to *Skidmore*.[38] Rather, *Chevron* "simply focused upon an additional, separate legal reason for deferring to certain agency determinations, namely, that Congress had delegated to the agency the legal authority to make those determinations."[39] Justice Breyer went on to add that, in his view, *Skidmore* "retain[ed] legal vitality," that courts should "continue to pay particular attention in appropriate cases to the experience-based views of expert agencies[,]" and that deference was warranted in the case at bar irrespective of the standard applied.[40]

Particularly as compared to *Mead*, *Christensen* did not initially garner much attention, perhaps because the Court was so fragmented as to the deference question, or maybe because the Court so quickly signaled its intent to revisit the question of *Chevron*'s scope the following Term in *Mead*. The merits of *Mead* concerned the proper tariff classification and duty rate for day planners under the Harmonized Tariff Schedule of the United States.[41] The Tariff Act of 1930 and regulations adopted by the Secretary of the Treasury thereunder charge the Customs Service with classifying merchandise and fixing the rate and amount of duty thereon, which the Customs Service does by issuing ruling letters.[42] In *Mead*, the Mead Corporation challenged a Customs Service ruling letter classifying the day planners from a category on which no tariff was imposed to a different category subject to a 4 percent tariff.[43] In evaluating the deference due to the agency's interpretation, the Court described the ruling letters as quite informal:

35. *Id.* at 591.

36. Justice Breyer's opinion technically was on behalf only of himself and Justice Ginsburg. *Id.* at 596 (Breyer, J., dissenting). Justice Stevens dissented separately, in an opinion also joined by Justices Breyer and Ginsburg, principally to challenge the majority's statutory analysis. *Id.* at 592 (Stevens, J., dissenting). In a footnote, however, Justice Stevens added that he agreed fully with Justice Breyer's statements regarding *Chevron*. *Id.* at 595 n.2. Consistently with Justice Breyer's opinion, Justice Stevens also cited *Skidmore* in claiming that the Department of Labor's interpretation was "thoroughly considered and consistently observed," and thus "unquestionably merits our respect." *Id.* at 595.

37. *Id.* at 596 (Breyer, J., dissenting).

38. *Id.*

39. *Id.*

40. *Id.* at 597.

41. United States v. Mead Corp., 533 U.S. 218, 222–25 (2001).

42. Tariff Act of 1930, 19 U.S.C. §§ 1202, 1500, 1502 (2012); 19 C.F.R. § 177.8 (2012).

43. *Mead*, 533 U.S. at 224–25.

> Any of the 46 port-of-entry Customs offices may issue ruling letters, and so may the Customs Headquarters Office . . . . Most ruling letters contain little or no reasoning, but simply describe goods and state the appropriate category and tariff. A few letters, like the Headquarters ruling at issue here, set out a rationale in some detail.[44]

The Court noted further that the different Customs offices issue between 10,000 and 15,000 such letters each year, and that the governing statute does not distinguish Headquarters letters from port-of-entry office letters as a matter of law.[45]

Noting that it had granted certiorari specifically to address *Chevron*'s scope, the Court in *Mead*—with Justice Souter writing on behalf of eight justices—held "that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[46] The Court did not elaborate on what it meant by "the force of law," but observed that "[d]elegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent."[47] Later in the opinion, the Court returned to that same theme, recognizing "a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed."[48] Here the Court cited *EEOC v. Arabian American Oil Co.*,[49] which concerned an Equal Employment Opportunity Commission interpretation of Title VII, as an instance in which Congress had not delegated the power to "promulgate rules or regulations."[50] The Court elaborated further that "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."[51] Having placed such emphasis on procedure, however, the Court then equivocated. "That said, and as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference, even when no such administrative formality was required and none was afforded."[52] For this, the Court cited as an example[53]

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44. *Id.* at 224 (footnotes omitted).
45. *Id.* at 233–34.
46. *Id.* at 226–27.
47. *Id.* at 227.
48. *Id.* at 229.
49. 499 U.S. 244 (1991).
50. *Mead*, 533 U.S. at 229–30 (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976)).
51. *Id.* at 230.
52. *Id.* at 230–31.

NationsBank of N.C., N.A. v. Variable Annuity Life Insurance Co.,[54] in which the Court had extended *Chevron* deference to an informal adjudication by the Comptroller of the Currency interpreting the National Bank Act.[55]

Applying this analysis to the case at bar, the Court concluded that while Congress had given the Customs Service the authority to adopt regulations with the force of law, Congress had not intended for Customs Service ruling letters to carry such force—notwithstanding the Tariff Act's use of the term "binding" in describing such rulings[56] and the potential that such rulings might have some precedential value for later transactions.[57] In particular, the Court noted that "a letter's binding character as a ruling stops short of third parties," that "Customs has regarded a classification as conclusive only as between itself and the importer to whom it was issued," and that "[o]ther importers are in fact warned against assuming any right of detrimental reliance."[58] Ultimately, therefore, the Court analogized the Customs Service ruling letter to the "policy statements, agency manuals, and enforcement guidelines" that *Christensen* had placed "beyond the *Chevron* pale."[59] As in *Christensen*, however, the Court recognized the continued vitality of *Skidmore* and its myriad factors.[60] Having concluded that Customs Service ruling letters lacked the force of law, therefore, the Court remanded the case for reconsideration using the appropriate standard.[61]

Reacting even more strongly than in *Christensen*, Justice Scalia dissented in an opinion that was scathing in its tone. He again asserted that *Chevron* called for deference to all "authoritative" agency interpretations of statutes, and thus that *Mead* made "an avulsive change in judicial review of federal administrative action."[62] He derided *Skidmore* as "th'ol' 'totality of the circumstances' test,"[63] "an empty truism,"[64] as well as an "anachronism."[65] He criticized what he labeled as "[t]he Court's new doctrine" as "neither sound in principle nor sustainable in practice,"[66] "absurd,"[67] and "not at all

53. *Id.* at 231.
54. 513 U.S. 251 (1995).
55. *Id.* at 256–57, 264.
56. *Mead*, 533 U.S. at 231–32 (citing 19 U.S.C. § 1502(a) (2012)).
57. *Id.* at 232 ("[P]recedential value alone does not add up to *Chevron* entitlement.").
58. *Id.* at 233.
59. *Id.* at 234 (citations omitted).
60. *Id.* at 228. In *Mead*, the Court not only quoted language from *Skidmore* emphasizing an interpretation's thoroughness, validity, and consistency, but also cited *Skidmore* in favor of considering "the degree of the agency's care," "formality," "relative expertness," and "persuasiveness." *Id.* (citations omitted). The Court also spoke of an agency's "thoroughness, logic, and expertness, [the ruling's] fit with prior interpretations, and any other sources of weight." *Id.* at 235.
61. *Id.* at 238–39.
62. *Id.* at 239 (Scalia, J., dissenting).
63. *Id.* at 241.
64. *Id.* at 250.
65. *Id.*
66. *Id.* at 241.
67. *Id.* at 245.

in accord with any plausible actual intent of Congress."[68] He predicted a parade of horribles including "protracted confusion,"[69] "an artificially induced increase in informal rulemaking,"[70] and "the ossification of large portions of our statutory law."[71]

Less than a year after the Court decided *Mead*, Justice Breyer wrote a majority opinion in *Barnhart v. Walton* that picked one of *Mead*'s key weak spots—specifically, which agency actions lacking notice-and-comment rulemaking or formal adjudication might be *Chevron*-eligible. *Barnhart* concerned an interpretation of the Social Security Act contained in a regulation adopted by the Social Security Administration through notice-and-comment rulemaking, published in the Federal Register, and incorporated in the Code of Federal Regulations.[72] Given that pedigree, the Court had no difficulty discerning that *Chevron* provided the appropriate standard of review—observing that the agency, "[a]cting pursuant to statutory rulemaking authority, . . . has promulgated formal regulations."[73] Applying *Chevron*, the Court concluded that deference to the agency's interpretation was appropriate because the statute "[did] not unambiguously forbid the regulation" and that "the Agency's construction is 'permissible'" in light of the statute's text and goals.[74]

Justice Breyer could have ended his analysis there, but he did not. Instead, Justice Breyer continued by noting both that "the Agency's regulations reflect the Agency's own longstanding interpretation," as reflected in informal guidance dating back several decades and, also, that "Congress has frequently amended or reenacted the relevant provisions without change"[75]—both elements that courts historically considered in conjunction with *Skidmore* analysis but find less relevant under *Chevron*.[76] Justice Breyer then suggested that the informal guidance documents alone might be eligible for *Chevron*.[77] Of course, the Court in *Christensen* had listed precisely these sorts of documents as ineligible for *Chevron* review given their lack of legal force.[78] Justice Breyer minimized *Christensen*'s

68. *Id.*
69. *Id.*
70. *Id.* at 246.
71. *Id.* at 247.
72. Barnhart v. Walton, 535 U.S. 212, 217 (2002) (citing 20 C.F.R. § 404.1520(b) (2001), adopted at 65 Fed. Reg. 42774 (2000)).
73. *Id.*
74. *Id.* at 218–19.
75. *Id.* at 219–20.
76. Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1248–50 (2007); *see also Barnhart*, 535 U.S. at 226 (Scalia, J., concurring in part and concurring in judgment) (noting Breyer's emphasis on an interpretation's longevity and labeling that factor "an anachronism—a relic of the pre-*Chevron* days").
77. *Barnhart*, 535 U.S. at 221 (stating that informal agency interpretations are "not automatically deprive[d]" of *Chevron* deference).
78. Christensen v. Harris Cnty., 529 U.S. 576, 586–87 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.").

significance, pointing to *Mead*'s equivocation regarding the significance of procedure and rejecting *Christensen*'s list of guidance documents as absolutely prohibiting *Chevron* deference.[79] Finally, Justice Breyer culminated his analysis with the following passage that has found its way into numerous opinions since:

> In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.[80]

Without backing away from his disdain for the Court's decision in *Mead*, Justice Scalia in concurrence challenged this last part of Justice Breyer's opinion, suggesting that the Court needed to explain further why informal guidance could be *Chevron*-eligible under *Mead*.[81] After all, the informal guidance documents that Justice Breyer cited as further support for *Chevron* deference in *Barnhart* were precisely the sort of pronouncements that Justice Thomas described in *Christensen* as lacking the force of law and, thus, ineligible for *Chevron* deference.

Knowledgeable commentators quickly noted Justice Breyer's inconsistency with *Christensen* as well. The late Bob Anthony maintained that Justice Breyer's opinion in *Barnhart* "could sow the seeds of grievous confusion in the law of *Chevron* deference" by muddying the relative clarity of *Christensen* and *Mead*.[82] The late Charles Koch recognized the Court's decision in *Barnhart* as a partial repudiation of *Christensen*, "solidif[ying] Breyer's position in *Christensen* that policymaking within the agency's delegated authority would have special force even if not developed through notice-and-comment rulemaking, i.e. not embodied in a legislative rule."[83] Bill Funk suggested of "the Court's perturbations on *Chevron*/*Mead*" that "the more you explain it, the more I don't understand it."[84] Tom Merrill and Kathryn Watts contended, alternatively, "that the division in *Christensen* may be more indicative of the lack of consensus among the Justices than what the united front in *Mead* might imply."[85]

II. THREE VERSIONS OF *MEAD*, *CHEVRON*, AND *SKIDMORE*

In all of *Christensen*, *Mead*, and *Barnhart*, eight justices (Justice Scalia excepted) embraced a few common intuitions. The first is that Congress

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79. *Barnhart*, 535 U.S. at 222.

80. *Id.*

81. *Id.* at 226–27.

82. Robert A. Anthony, *Keeping* Chevron *Pure*, 5 GREEN BAG 2D 371, 371 (2002).

83. Charles H. Koch, Jr., *Judicial Review of Administrative Policymaking*, 44 WM. & MARY L. REV. 375, 400–01 (2002).

84. William Funk, *Supreme Court News*, ADMIN. & REG. L. NEWS, Summer 2002, at 8(quoting Mark Twain).

85. Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 576 (2002) (citing *Barnhart* and other post-*Mead* cases).

often, but not always, intends for an agency rather than the courts to shoulder primary responsibility for filling statutory gaps, and *Chevron* deference is a product of congressional intent. The second is that agencies wear multiple hats, and not every action by an agency or its representatives reflects the identification of and deliberate effort to fill a statutory gap in the *Chevron* sense. *Mead* in particular framed these intuitions in terms of both a holding and a two-part test, which presumably is why *Mead* dominates the discussion of *Chevron*'s scope. But *Christensen* and *Barnhart* reflect the same intuitions.

All of that said, the fact that most of the justices sign onto these basic intuitions does not mean that they agree about how to apply these principles in practice. Indeed, from the line of cases discussed in Part I,[86] different approaches to *Mead* have emerged, feeding the perceptions of doctrinal confusion.

A. The Decision Tree Model

One line of cases treats *Mead*, *Chevron*, and *Skidmore* all as separate and distinct standards, and each step of *Mead* and *Chevron* as (more or less) separate and distinct inquiries within those standards. *Mead*'s holding calls for a reviewing court to ascertain first whether Congress delegated to the agency the power to act with the force of law.[87] If the court finds that the agency does possess such delegated power, then *Mead*'s holding asks whether the agency intended to exercise such authority in adopting the interpretation at issue.[88] If the answer to both *Mead* questions is affirmative, then the reviewing court moves on to apply *Chevron*'s two steps. *Chevron* asks first whether the meaning of the statute is clear, for if it is, then the court as well as the agency must give effect to the clearly expressed intent of Congress.[89] If the statute is ambiguous, then *Chevron*'s second step asks only whether the agency's interpretation is permissible or reasonable.[90] If the answer to either *Mead* question is negative, however, then the reviewing court applies *Skidmore* instead.[91]

Not all cases follow the steps in precisely this way. For example, much like *Chevron*, *Skidmore* at least implicitly involves some inquiry into whether or not the statute is clear, with the contextual factors not coming into play unless the statute is ambiguous.[92] At least theoretically, therefore, the *Mead* steps can arise either as a Step Zero or as a Step One-and-a-

86. *See supra* Part I.
87. United States v. Mead Corp., 533 U.S 218, 226–27 (2001).
88. *Id.*
89. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).
90. *Id.* at 843–44.
91. *Mead*, 533 U.S. at 237–38.
92. *See* Hickman & Krueger, *supra* note 76, at 1280 (documenting the implicit "step one" evaluation of statutory ambiguity in many lower court decisions applying *Skidmore* review).

Half.[93] Courts sometimes seem to collapse *Mead*'s two steps into a single inquiry of whether Congress intended the particular agency action in question to carry the force of law.[94] Some courts and scholars maintain that, in reality, *Chevron* has only one step.[95] As compared to the relatively rule-like *Mead* and *Chevron* tests, of course, *Skidmore* is a classic standard—calling on reviewing courts to extend more or less deference to the agency depending on the presence or absence of several contextual factors[96]—leading to a fair amount of variability in its application as well. Agencies are repeat players before the courts, with the result that courts in some cases seem to skip *Mead* analysis altogether, relying on precedent to determine whether *Chevron* or *Skidmore* provides the standard of review.[97] In other cases, courts seem to skip all of the steps, concluding based on a fairly cursory analysis of the statute that they either would or would not

93. *E.g.*, Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 711–12 (2011) (considering whether the statute is ambiguous—i.e., *Chevron* Step One—before approaching *Mead* analysis); *see also* Michael P. Healy, *Reconciling* Chevron, Mead, *and the Review of Agency Discretion: Source of Law and the Standards of Judicial Review*, 19 GEO. MASON L. REV. 1, 39–40 (2011) (contending that *Mead* analysis generally ought to come after *Chevron* Step One); *cf.* Scott H. Angstreich, *Shoring Up* Chevron*: A Defense of* Seminole Rock *Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 64 (2000) (describing *Christensen*'s similar force-of-law inquiry as an intermediate step after *Chevron* Step One); Peter M. Shane, *Ambiguity and Policy Making*, 16 VILL. ENVTL. L.J. 19, 32–33 (2005) (advocating a "*Chevron-Mead* waltz" that begins by asking "whether the statute in question is susceptible to more than one plausible legal reading").

94. *E.g.*, Wilderness Soc'y v. U.S. Fish & Wildlife Serv., 316 F.3d 913, 921 (9th Cir. 2003), *rev'd en banc*, 353 F.3d 1051 (characterizing the question as whether a Fish and Wildlife Service special use permit "is the type of agency decision that Congress intended to 'carry the force of law'"); Swallows Holding, Ltd. v. Comm'r, 515 F.3d 162, 168 (3d Cir. 2008) ("*Mead* teaches that *Chevron* deference is appropriate only in situations where 'Congress would expect the agency to be able to speak with the force of law. . . .'"); Air Brake Sys., Inc. v. Mineta, 357 F.3d 632, 642 (6th Cir. 2004) ("[O]nly those administrative interpretations that Congress and the agency intend to have the '*force of law*,' . . . qualify for *Chevron* deference.").

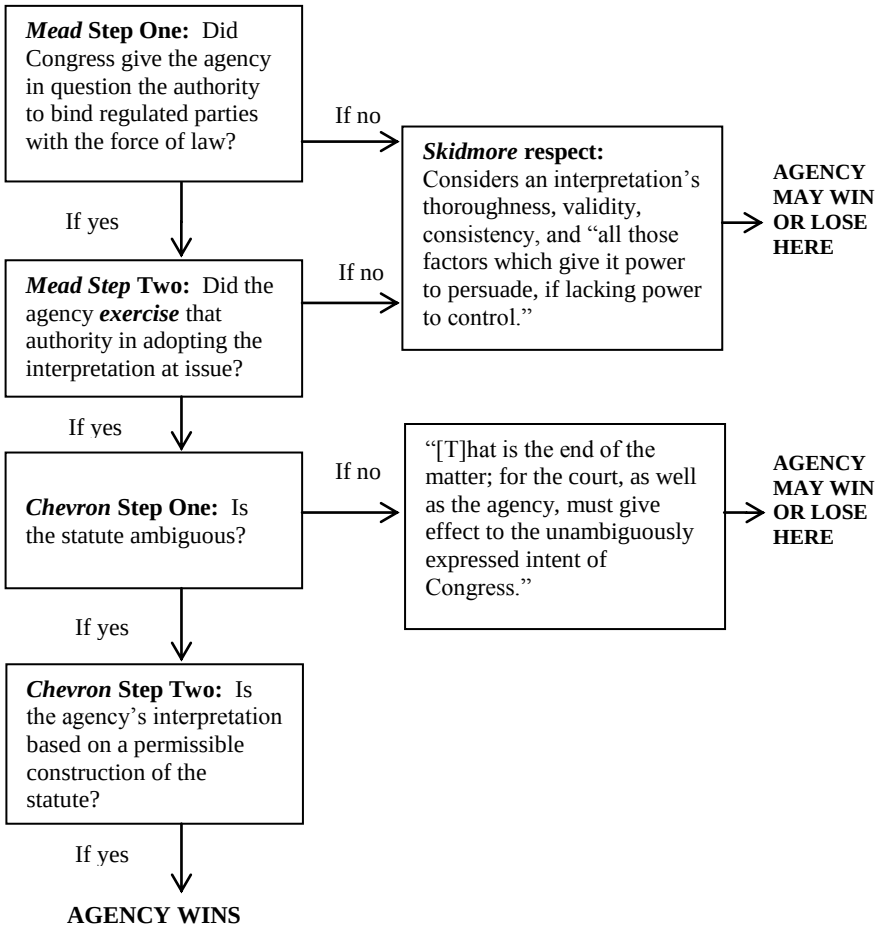
95. Matthew Stephenson and Adrian Vermeuele wrote a rather provocative article by that title. *See* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009). Justice Scalia has expressed sympathy with their argument. United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1846 n.1 (Scalia, J., concurring) (stating that "'Step 1' has never been an essential part of *Chevron* analysis" and citing Stephenson and Vermeule). Other courts have followed suit, though to varying degrees. *E.g.*, United States v. Garcia-Santana, 743 F.3d 666, 678 (9th Cir. 2014) (interpreting Supreme Court precedent as "authoriz[ing] courts to omit evaluation of statutory ambiguity on the ground that, 'if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable'" (citations omitted)); Friends of the Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210, 1219 (11th Cir. 2009) (suggesting merely that *Chevron*'s two steps are "obviously intertwined").

96. United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) (deriding *Skidmore* as "th'ol' 'totality of the circumstances' test"); Thomas W. Merrill, *supra* note 21, at 808 (describing *Chevron* as "more rule-like" and *Skidmore* as "more standard-like").

97. *E.g.*, Vance v. Ball State Univ., 133 S. Ct. 2434, 2461 (2013) (relying upon precedent along with brief *Mead* citation in applying *Skidmore* review to EEOC guidance); *Home Concrete*, 132 S. Ct. at 1842 (relying upon precedent rather than *Mead* analysis to support *Chevron* review for Treasury regulation); Holder v. Martinez Gutierrez, 132 S. Ct. 2011, 2017 (2012) (relying upon precedent in supporting *Chevron* standard for Board of Immigration Appeals interpretation of Immigration and Nationality Act).

defer under either *Chevron* or *Skidmore*.[98] None of these caveats and variations dispute, however, the separateness of the analytical steps, which can therefore be depicted, one way or another, as a decision tree.

Figure 1. The Decision Tree Model.



Many Supreme Court opinions follow a methodical, step-by-step pattern consistent with this view of the relationship among *Mead*, *Chevron*, and *Skidmore*. The analysis is frequently quite brief, and even rather rote. In applying *Mead*, at least, the Court simply looks for provisions in the statute

98. *E.g.*, Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004) ("[W]e neither defer nor settle on any degree of deference because the [EEOC] is clearly wrong."); Edelman v. Lynchburg Coll., 535 U.S. 106, 114 (2002) ("Because we so clearly agree with the EEOC, there is no occasion to defer and no point in asking what kind of deference, or how much.").

at issue giving the agency the power to act in a legally binding way either through rulemaking or adjudication, then considers whether the agency did just that.

For example, in *Household Credit Services, Inc. v. Pfennig*,[99] a unanimous Court recognized first that the Truth in Lending Act gives the Federal Reserve Board authority to adopt binding regulations, and also that the challenged regulations (which were adopted using notice-and-comment rulemaking) were therefore eligible for *Chevron* review.[100] The Court then proceeded to declare the relevant statutory language to be ambiguous at *Chevron* Step One[101] and the interpreting regulation reasonable at *Chevron* Step Two.[102] Similarly, in *United States v. Eurodif S.A.*,[103] a unanimous Court recognized separately first that the Tariff Act of 1930 gives the Department of Commerce the authority to act with legal force, and then that the Commerce Department exercised that authority through adjudication, before turning finally to *Chevron*'s two steps to consider the statutory interpretation at issue.[104] The Court's analysis followed the same pattern in evaluating Interstate Commerce Commission regulations interpreting the Intermodal Surface Transportation Efficiency Act of 1991[105] and Board of Immigration Appeals adjudications interpreting the Immigration and Nationality Act.[106]

In *Mayo Foundation for Medical Education & Research v. United States*,[107] a nearly unanimous Court (Justice Kagan abstained) altered the order of the steps but still treated each as analytically distinct. The Court started first with *Chevron* Step One, evaluating whether the Internal Revenue Code was ambiguous regarding FICA withholding for medical residents.[108] Concluding it was, and rejecting an alternative, tax-specific standard of review,[109] the Court then applied *Mead*'s steps seriatim to hold in favor of *Chevron* review for Treasury regulations promulgated using notice-and-comment rulemaking.[110] Finally, the Court considered and deferred to Treasury's interpretation of the statute under *Chevron*'s second step.[111]

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99. 541 U.S. 232 (2004).
100. *Id.* at 238–39.
101. *Id.* at 241.
102. *Id.* at 244–45.
103. 555 U.S. 305 (2009).
104. *Id.* at 314–18.
105. Yellow Transp., Inc. v. Michigan, 537 U.S. 36, 45–46 (2002). Justice Stevens wrote a concurring opinion in the case but did not disagree with the Court's *Mead* analysis. *Id.* at 48 (Stevens, J., concurring).
106. Negusie v. Holder, 555 U.S. 511, 513–15 (2009).
107. 131 S. Ct. 704 (2011).
108. *Id.* at 711.
109. Whether Department of Treasury regulations interpreting the Internal Revenue Code should be evaluated under a pre-*Chevron*, tax-specific standard of review articulated in *National Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472 (1979), rather than *Mead*, *Chevron*, and *Skidmore* was a key issue in the *Mayo* case. *Id.* at 710–14.
110. *Id.* at 714.
111. *Id.* at 714–15.

Even some more controversial cases exhibit this approach. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[112] the Court addressed an issue that had long divided courts and scholars—whether a lower court's stare decisis fealty to its own precedents could trump *Chevron* deference.[113] The Court divided six to three, and the justices wrote four separate opinions. In particular, Justices Breyer[114] and Scalia[115] wrote concurring and dissenting opinions, respectively, in which they argued about the proper interpretation of *Mead*. Yet, writing for the majority, Justice Thomas seemed to find the issue an easy one to resolve under a step-by-step application of *Mead*: (1) the Communications Act gives the FCC broad rulemaking authority, and (2) the FCC exercised that authority when it used notice-and-comment rulemaking to adopt the interpretation at issue, hence (3) *Chevron* provided the right standard.[116] Subsequent sections of Justice Thomas's opinion then concluded that the statute was ambiguous at *Chevron* Step One[117] and that the agency's interpretation was reasonable at *Chevron* Step Two.[118]

B. A More Blended Approach

A second line of the Court's post-*Mead* rhetoric reflects a substantially more fluid approach to judicial deference to agency statutory interpretations. Although not precisely articulated thusly, this model seems to envision *Mead*, *Chevron*, and *Skidmore* collectively as embracing a single, unified doctrine that asks simply whether Congress would want a reviewing court to defer to the agency interpretation at issue. To answer that question, this approach considers *Mead*'s emphasis on the presence or absence of delegated power as merely identifying another element—along with traditional tools of statutory construction and the various *Skidmore* factors—that may be relevant in discerning congressional intent regarding deference. To some extent, this view of deference doctrine resembles Justice Scalia's "th'ol' 'totality of the circumstances'"[119] critique from *Mead*. Though harder to depict, one might envision this approach as generating a word cloud for each case: When one assembles the picture, what pops out, and does it favor deference or counsel against it?

112. 545 U.S. 967 (2005).
113. *Id.* at 982–83.
114. *Id.* at 1003–05 (Breyer, J., concurring).
115. *Id.* at 1005–20 (Scalia, J., dissenting).
116. *Id.* at 980–81 (majority opinion).
117. *Id.* at 989.
118. *Id.* at 997.
119. United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

Figure 2. The Word Cloud.

Justice Breyer's many opinions on the matter clearly espouse this approach. Recall, for example, his claim in *Christensen* that *Chevron* did not alter *Skidmore* but merely identified delegation as an additional factor to consider.[120] He also insisted in *Barnhart* that *Christensen* did not absolutely prohibit *Chevron* deference for the listed informal guidance, and that factors like subject matter and statutory complexity are at least as important as the procedures the agency followed.[121] Some of Justice Breyer's other opinions follow a similar theme.

For example, in the *Brand X* case discussed above, although Justice Thomas's majority opinion followed a rather rote decision tree analysis in extending *Chevron* deference to FCC notice-and-comment rulemaking,[122] Justice Breyer's concurring opinion described *Mead* a little differently.[123] He highlighted language from *Mead* that "delegation 'may be shown *in a variety of ways, as by* an agency's power to engage in adjudication or notice-and-comment rulemaking, *or by some other indication of a comparable congressional intent*,'" and also that the Court "has recognized *a variety of indicators* that Congress would expect *Chevron* deference."[124] Procedure is not dispositive, Justice Breyer says, "because Congress may have intended *not* to leave the matter of a particular interpretation up to the agency, irrespective of the procedure the agency uses to arrive at that interpretation, *say, where an unusually basic legal question is at issue*."[125]

In *Carcieri v. Salazar*,[126] in which a majority of the Court found the meaning of the statute clear,[127] Justice Breyer in concurrence found the statute ambiguous.[128] He did not dispute that Congress generally had tasked the agency with administering the statute at issue.[129] Justice Breyer did not, however, turn explicitly to *Mead*'s second step, for example by

120. Christensen v. Harris Cnty., 529 U.S. 576, 596 (2000) (Breyer, J., dissenting).
121. Barnhart v. Walton, 535 U.S. 212, 221–22 (2002).
122. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).
123. *Id.* at 1003–04 (Breyer, J., concurring).
124. *Id.* at 1004 (quoting *Mead*, 533 U.S. at 227, 237).
125. *Id.* at 1006 (emphasis added).
126. 555 U.S. 379, 395 (2009).
127. *Id.*
128. *Id.* at 396 (Breyer, J., concurring).
129. *Id.*

evaluating the format in which the agency offered its interpretation. Instead he offered a different line of reasoning containing elements of both *Chevron* and *Skidmore*. He observed that *Skidmore* did not support the agency's interpretation because the agency had been inconsistent.[130] Justice Breyer also noted that *Chevron* did not help the agency because the interpretative question was "of considerable importance," and the "legislative history makes clear that Congress focused directly upon" the relevant language, yet "nothing in that history indicates that Congress believed departmental expertise should subsequently play a role" in resolving the issue.[131] "These circumstances," Justice Breyer opined, "indicate that Congress did not intend to delegate interpretive authority to the Department. Consequently, its interpretation is not entitled to *Chevron* deference, despite linguistic ambiguity."[132]

Perhaps the most extensive articulation of Justice Breyer's approach is his concurring opinion in *City of Arlington v. FCC*.[133] The majority and dissenting opinions in that case might be characterized as arguing over a statute-by-statute or provision-by-provision approach to assessing congressional delegation at *Mead* Step One.[134] By contrast, Justice Breyer offered a laundry list of elements for a reviewing court to consider in deciding whether to defer to the agency. Delegation was mentioned, followed by traditional tools of statutory construction and an assessment of statutory ambiguity, though "the existence of statutory ambiguity is sometimes not enough to warrant the conclusion that Congress has left a deference-warranting gap for the agency to fill because . . . other, sometimes context-specific, factors will on occasion prove relevant."[135] Quoting *Barnhart v. Walton*, he called again for considering "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute . . . and the careful consideration the Agency has given the question over a long period of time."[136] He also described the "distance" of the relevant provision's subject matter "from the agency's ordinary statutory duties" as potentially "relevant."[137] Continuing, he added:

130. *Id.*
131. *Id.* at 396–97.
132. *Id.* at 397.
133. 133 S. Ct. 1863, 1875 (2013) (Breyer, J., concurring).
134. At least, writing for the majority, Justice Scalia characterized the dissenters' argument in *City of Arlington* this way, claiming that the dissent would require a reviewing court to "search provision-by-provision to determine whether [a congressional] delegation covers the specific provision and particular question before the court." *Id.* at 1874 (majority opinion) (internal quotation marks omitted). By contrast, Justice Scalia arguably substantiated *Chevron*'s applicability (without directly citing *Mead*) by documenting that Congress had given general rulemaking authority over the statute to the FCC, observing that said rulemaking authority extended to the statutory language at issue in the case, and noting that the FCC relied on that authority in promulgating the challenged ruling. *Id.* at 1866–67; *see also* Andrew M. Grossman, City of Arlington v. FCC*: Justice Scalia's Triumph*, 2013 CATO SUP. CT. REV. 331 (characterizing the parties' arguments in this way).
135. *City of Arlington*, 133 S. Ct. at 1875 (Breyer, J., concurring).
136. *Id.*
137. *Id.*

> Moreover, the statute's text, its context, the structure of the statutory scheme, and canons of textual construction are relevant in determining whether the statute is ambiguous and can be equally helpful in determining whether such ambiguity comes accompanied with agency authority to fill a gap with an interpretation that carries force of law. Statutory purposes, including those revealed in part by legislative and regulatory history, can be similarly relevant.[138]

Finally, citing *Skidmore*, Justice Breyer mentioned that, even if Congress would not have wanted the agency rather than the court to resolve the particular ambiguity in question, the agency's interpretation still might be persuasive given the agency's expertise.[139]

The extent to which Justice Breyer has persuaded others toward his vision is unclear. Although several justices have written opinions that seem to follow the decision tree model to *Mead*, *Chevron*, and *Skidmore*, no other justice has so clearly embraced the more blended approach advocated by Justice Breyer. The closest may be Justice Stevens, who authored an opinion in *Negusie v. Holder*, joined by Justice Breyer, describing "*Chevron*'s domain" as including agency rules that address "central legal issues" and agency adjudications that decide "pure questions of statutory construction," but not agency rules that resolve "interstitial questions" and agency adjudications that "apply[] law to fact"—suggesting the more open-ended inquiry into delegation reflected in Justice Breyer's writings.[140] Also, in *Astrue v. Capato ex rel. B.N.C.*,[141] Justice Ginsburg wrote an opinion for a unanimous Court that gave *Chevron* deference to a Social Security Administration regulation interpreting the Social Security Act, and in so doing noted "the SSA's longstanding interpretation," "adhered to without deviation for many decades," in addition to Congress's delegation of rulemaking authority and the agency's use of notice-and-comment rulemaking procedures.[142] Justice Ginsburg additionally joined Justice Breyer's opinion in *Christensen v. Harris County*.[143]

As already noted, Justice Breyer wrote for an overwhelming majority of the Court in *Barnhart v. Walton*, but the more controversial part of his opinion was dicta.[144] Since then, he has written several opinions of the Court that contained at least some discussion of *Mead* and were joined by various combinations of justices, or even all of them. Those cases involved relatively straight-forward applications of *Chevron* review to notice-and-comment regulations[145] or *Skidmore* review for informal guidance

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138. *Id.* at 1876 (citations omitted).

139. *Id.*

140. Negusie v. Holder, 555 U.S. 511, 531 (2009) (Stevens, J., concurring in part and dissenting in part) (internal quotation marks omitted).

141. 132 S. Ct. 2021 (2012).

142. *Id.* at 2033–34.

143. 529 U.S. 576, 598 (2000) (Breyer, J., dissenting).

144. *See supra* notes 72–81 and accompanying text.

145. *See* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007); Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc., 550 U.S. 45 (2007); Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 90 (2007). In *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836 (2012), the government claimed *Chevron* deference for a

documents,[146] with little or no opposition regarding the standard of review.[147] Moreover, none of those opinions offered particularly extensive discussions of *Mead*, *Chevron*, and *Skidmore*. Some of Justice Breyer's colleagues may have joined those opinions because they agree with everything he said, including a stray remark here or there about *Mead* and *Chevron*'s scope, but others may have decided that the stray remarks were dicta and not worth writing separately to disagree. Meanwhile, outside of *Christensen* and *Barnhart*, no other justice joined Justice Breyer's extended and eloquent discussions of *Mead*, *Chevron*, and *Skidmore* in *Brand X*, *Carcieri*, and *City of Arlington*.

C. Justice Scalia Stands Alone

Justice Scalia clearly holds his own view of *Chevron* that eschews both *Mead* and *Skidmore*. He regards the former as inessential at best and the latter as anachronistic. Since his dissent in *Mead*, Justice Scalia continues to criticize *Mead* and its progeny,[148] call upon the Court to overrule *Mead*,[149] and otherwise mock his colleagues' rhetoric concerning deference.[150] Although Justice Scalia authored the majority opinion in *City of Arlington*,[151] which could be characterized as a case about *Mead*'s first step,[152] he completely avoided any mention of *Mead* until responding to the dissent's framing of the case as a *Mead* issue.[153]

Instead, Justice Scalia advocates a regime of *Chevron* review for all "authoritative" agency interpretations and no deference for any other agency pronouncements.[154] He is less clear about exactly which agency interpretations count as authoritative, offering individual examples but not a

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regulation with arguable procedural irregularities, but the Court rejected the government's deference claim on the ground that the meaning of the statute was clear.

146. Kasten v. Saint-Gobain Perf. Plastics Corp., 131 S. Ct. 1325 (2011).

147. Justice Scalia challenged the fuzziness of Justice Breyer's rhetoric in *Kasten* but would not have deferred regardless. *Id.* at 1339–40 & nn.5–6 (Scalia, J., dissenting).

148. *E.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1016–18 (2005) (Scalia, J., concurring) (criticizing the majority's "novel" solution to a problem allegedly created by *Mead*); Smith v. City of Jackson, 544 U.S. 228, 245 (2005) (Scalia, J., concurring) (criticizing *Mead* for creating "unduly constrained standards of agency deference").

149. *See, e.g.*, Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 296 (2009) (Scalia, J., concurring) ("I favor overruling *Mead*. Failing that, I am pleased to join an opinion that effectively ignores it."); *Smith*, 544 U.S. at 245 (claiming continued adherence to "the pre-*Mead* formulation of *Chevron*").

150. *E.g.*, *Kasten*, 131 S. Ct. at 1340 n.5 (criticizing majority for citing *Mead* without specifically deferring under either *Chevron* or *Skidmore*); *Brand X*, 545 U.S. at 1016, 1017 (seeing irony in the majority's rejection of the agency's construction while simultaneously permitting the agency to promulgate a new regulation that would contradict the Court's interpretation).

151. 133 S. Ct. 1863 (2013).

152. *See supra* note 134 and accompanying text.

153. *City of Arlington*, 133 S. Ct. at 1874.

154. *E.g.*, Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 601–02 (2004) (Scalia, J., dissenting); Christensen v. Harris Cnty., 529 U.S. 576, 590–91 (2000) (Scalia, J., concurring).

comprehensive definition.[155] Justice Scalia's conception of *Chevron* obviously extends to more agency actions than just notice-and-comment rulemaking and formal adjudication. In *Christensen*, he cited favorably previous Court decisions extending *Chevron* review to informal adjudications and a "longstanding" FDA interpretation reflected in an FDA policy statement; acknowledged that a Department of Labor Wage and Hour Division opinion letter alone might not be sufficiently authoritative; but said that the opinion letter plus an amicus brief cosigned by the Solicitor of Labor would be, as would the amicus brief alone.[156] In *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*,[157] Justice Scalia similarly described an amicus brief signed by the Solicitor of Labor and supported by a years-old Department of Labor advisory opinion as authoritative and deserving *Chevron* deference. As Justice Scalia elsewhere has labeled factors like longevity and consistency as unnecessary for *Chevron* deference generally, it is unclear to what extent those factors play into his assessment of *Chevron* eligibility. And, as Justice Breyer typically blends the various elements of *Mead*, *Chevron*, and *Skidmore* into a single inquiry, it is difficult to discern whether Justice Scalia's authoritativeness approach is broader or narrower in scope.

Regardless, beyond his known preference for simplifying judicial doctrine generally,[158] Justice Scalia's willingness to apply *Chevron* review so broadly may be at least partly related to his approach to *Chevron* analysis overall. Specifically, Justice Scalia has stated publicly his view that there are not many cases in which he cannot employ traditional tools of statutory construction to find a statute's clearly preferable meaning.[159] His approach to *Chevron* Step Two, when he gets there, seems to follow a heavily textualist, traditional-tools approach as well.[160] Accordingly, there are comparatively few cases in which Justice Scalia would ever need to defer to the agency's interpretation.[161] (Hence, too, his apparent agreement with Matthew Stephenson and Adrian Vermeule that *Chevron* review really has

155. *E.g.*, *Christensen*, 529 U.S. at 590–91 (listing examples from precedents and discussing opinion letters and amicus briefs).

156. *Id.* at 590–91.

157. 541 U.S. 1, 24–25 (2004) (Scalia, J., concurring).

158. *See generally, e.g.*, Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–81 (1989) (discussing his preference for adopting clear rules to govern judicial decision making rather than deciding cases based on the "totality of the circumstances"); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597, 1634 (1990) ("Much of [Justice Scalia's] jurisprudence now seems built on the supposed separation of law and policy and the need to have bright-line rules to allow for predictability and restraint in judging.").

159. Scalia, *supra* note 9, at 521.

160. Justice Scalia has written three opinions for the Court concluding that, while the statutes at issue were ambiguous, the agency's interpretation was nevertheless not among the textually reasonable alternatives. *See* Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2442–45 (2014); Rapanos v. United States, 547 U.S. 715, 731–32 (2006); AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 392 (1999).

161. *Rapanos*, 547 U.S. at 731–39; *AT&T Corp.*, 525 U.S. at 387–92.

only one step.[162]) In those few cases in which Justice Scalia cannot resolve statutory meaning using traditional tools, the choice between competing interpretations will be most obviously driven by policy choice, agency expertise will be at its zenith, and judicial expertise likely will be at its nadir. Under such conditions, so long as Justice Scalia is satisfied that the interpretation at issue is both sufficiently official to represent the decided views of key agency personnel, he is usually happy to extend *Chevron* deference. By comparison, Justice Scalia's colleagues typically seem more prepared to find statutes to be ambiguous and move on to *Chevron* Step Two, which may explain why they are more concerned with limiting the scope of *Chevron*'s applicability.

Ultimately, however, the primary obstacle to Justice Scalia's approach to *Mead*, *Chevron*, and *Skidmore* is his colleagues' refusal to subscribe to his view. Notably, even when they join his concurring or dissenting opinions more generally, the other justices will decline to join the parts that criticize *Mead*.[163]

III. IMPLICATIONS

Consistent with the complaints of *Mead* critics, the Court's vacillating rhetoric about the interaction of *Mead*, *Chevron*, and *Skidmore* has undoubtedly sowed some amount of confusion. It is unclear, however, that the practical impact of that confusion has been especially great.

For all of the Court's rhetorical inconsistency, much of its *Mead* jurisprudence is pretty unremarkable, at least as regards *Mead* itself. A quick survey shows that, over thirteen Terms, thirty-nine Supreme Court cases offer opinions that cite *Mead*.[164] Only a few of those cases featured clearly articulated disagreements among the justices over the standard of review to be applied. *Brand X* and *City of Arlington*, both discussed above, were particularly contentious, with the phases of *Mead* all spectacularly displayed. In *Gonzales v. Oregon*,[165] Justice Scalia was joined by Justices Roberts and Thomas in objecting to the majority's evaluation of a Department of Justice interpretative rule under *Skidmore* rather than *Chevron*, although he also found the rule to offer "*the most natural*

162. United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1846 & n.1 (2012) (Scalia, J., concurring) (suggesting that the only significant question for *Chevron* analysis is whether the agency's interpretation is reasonable, and that a separate inquiry into statutory ambiguity is "a waste of time," and citing Stephenson & Vermeule, *supra* note 95).

163. *E.g.*, Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325 (2011) (Scalia, J., dissenting) (joined by Justice Thomas, except for footnote 6, in which Justice Scalia criticized *Christensen* and *Mead* as "incoherent"); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1005–14 (2005) (Scalia, J., dissenting) (joined by Justices Souter and Ginsburg, but not with respect to the part of the opinion in which Justice Scalia criticized *Mead*).

164. I determined this statistic with a simple Keycite of the *Mead* decision in Westlaw. That Keycite yields forty hits, but one is to a memorandum opinion in which the Court merely remanded a case back to the Seventh Circuit for reconsideration in light of *Mead*. Household Int'l Tax Reduction Inv. Plan v. Matz, 533 U.S. 925 (2001).

165. 546 U.S. 243 (2006).

interpretation" as well.[166] In *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, Justice Scalia alone thought that *Chevron* rather than *Skidmore* should apply in evaluating a Department of Labor advisory opinion.[167]

By comparison, most of the cases in which the Court cited *Mead* offered little or no disagreement in either extending *Chevron* review to obviously eligible notice-and-comment rulemaking[168] and formal[169] (or formal-ish)[170] adjudications and applying *Skidmore* to informal guidance[171] and similarly nonbinding interpretations.[172] Indeed, post-*Mead*, the Court has never actually extended *Chevron* deference to interpretations lacking with notice-and-comment rulemaking or relatively formal adjudication procedures.

That said, the Court may have deliberately dodged *Mead* issues in some instances. In several cases, the majority avoided applying any of *Mead*,

166. *Id.* at 281–84 (Scalia, J., dissenting).

167. 541 U.S. 1, 24 (2004) (Scalia, J., concurring).

168. *See, e.g.*, EPA v. EME Homer City Generation, LP, 134 S. Ct. 1584 (2014); Astrue v. Capato, 132 S. Ct. 2021 (2012); Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44 (2011); Cuomo v. Clearing House Ass'n, 557 U.S. 519 (2009); Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007); Global Crossing Telecomms., Inc. v. Metrophones Telecomm., Inc., 550 U.S. 45 (2007); Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81 (2007); Household Credit Servs. v. Pfennig, 541 U.S. 232 (2004); Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002); Yellow Transp., Inc. v. Michigan, 537 U.S. 36 (2002); *see also* Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261 (2009) (describing EPA regulations as *Chevron*-eligible before evaluating guidance interpreting regulations under Auer v. Robbins, 519 U.S. 452 (1996)); Barnhart v. Walton, 535 U.S. 212 (2002) (applying *Chevron* to notice-and-comment rulemaking unanimously even while disagreeing over dicta).

169. *See* Negusie v. Holder, 555 U.S. 511 (2009); SEC v. Zandford, 535 U.S. 813 (2002).

170. *See* United States v. Eurodif, S.A., 555 U.S. 305 (2009). Although the Department of Commerce antidumping adjudication in *Eurodif* seems not to have followed the formal procedures prescribed by the Administrative Procedure Act, the government's brief established the statutory delegation of decision-making authority to agency and relative formality of the agency's procedures. Brief for Petitioner, *Eurodif*, 555 U.S. 511 (Nos. 07-1059, 07-1078), 2008 WL 2794014, at *23–24; *see also* Lucius B. Lau, *Agency Interpretations of the Statute After* Mead *with a Special Emphasis on the Antidumping and Countervailing Duty Laws*, 12 FED. CIR. B.J. 223, 234–37 (2002) (justifying *Chevron* review for analogous adjudications under *Mead*).

171. Wos v. E.M.A. *ex rel* Johnson, 132 S. Ct. 1391 (2013) (agency memorandum and letter); Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325 (2011) (EEOC compliance manual and Department of Labor litigation briefs); Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461 (2004) (EPA guidance memoranda); Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371 (2003) (claims processing instruction manual).

172. Dada v. Mukasey, 554 U.S. 1 (2008) (proposed regulation); Wis. Dep't of Health & Family Servs. v. Blumer, 534 U.S. 473 (2002) (proposed regulation in addition to regional guidance letter); *see also* Christopher v. Smithkline Beecham Corp., 132 S. Ct. 2156, 2169 (2012) (applying *Skidmore* standard to agency legal briefs interpreting agency regulations after declining to extend *Auer* deference); Wyeth v. Levine, 555 U.S. 555 (2009) (declining to defer to agency statements regarding state law preemption); Riegel v. Medtronic, Inc., 552 U.S. 312, 326–27 (2008) (finding statutory meaning clear but conceding dissent's statement that *Skidmore* would provide the standard for evaluating FDA amicus brief).

Chevron, or *Skidmore* by finding the statute's meaning clear.[173] In a few of these cases, the Court explicitly reserved or declined to resolve the *Mead* issue.[174] In other instances, the Court simply resolved the statutory question without relying on any of *Mead*, *Chevron* or *Skidmore*, notwithstanding party briefs or concurring or dissenting opinions discussing those cases.[175] Regardless, the fact remains that the justices managed to agree about *Mead*'s application substantially more often than they disagreed.

Far more important, given the limited size of the Court's docket, is how the justices' differing views of *Mead*, *Chevron*, and *Skidmore* have influenced the federal circuit courts. Are they just as divided? Have the Court's varying rhetorical flourishes yielded the muddled doctrinal mess predicted by Justice Scalia?

Although admittedly based only on informal impressions rather than empirical analysis, contrary to *Mead*'s critics, I would assert that *Mead* overall has had a stabilizing effect on the lower courts' *Chevron* jurisprudence. More often than not, the circuit courts of appeals seem to follow a relatively rote version of the decision tree model of *Mead*, *Chevron*, and *Skidmore*, rather than the more fluid and open-ended version advocated by Justice Breyer. While this approach is not always doctrinally precise and unanswered questions remain, it is also relatively easy to apply and yields consistent outcomes in most cases. That said, hard cases exist, and the Court's rhetorical waffling complicates their resolution. Moreover, the downside of the circuit courts' approach to the decision tree model is that it is often ill-suited to resolve those hard cases.

A. Easy Cases

To a great extent, the circuit courts have made *Mead* work by applying the decision tree model in a particularly rote fashion.[176] In applying *Mead*'*s* first step, the circuit courts typically look for an explicit statutory

173. Although *Chevron* review explicitly calls for a finding of statutory clarity or ambiguity, *Skidmore* analysis implicitly assumes a similar finding. Hickman & Krueger, *supra* note 76, at 1280.

174. Two concern Equal Employment Opportunity Commission regulations interpreting Title VII. Gen. Dynamics Land Sys. v. Cline, 540 U.S. 581 (2004); Edelman v. Lynchburg Coll., 535 U.S. 106 (2002). A third upheld the method of calculating good time credit used by the Bureau of Prisons. Barber v. Thomas, 560 U.S. 474 (2010); *see also* Fed. Express Corp. v. Holowecki, 552 U.S. 389 (2008) ("assum[ing]" that EEOC policy statements are ineligible for *Chevron* deference under *Mead*).

175. Lawson v. FMR, LLC, 134 S. Ct. 1158 (2014); Vance v. Ball State Univ., 133 S. Ct. 2434 (2013); Carcieri v. Salazar, 555 U.S. 379 (2009); Hoffman Plastics Compounds v. NLRB, 535 U.S. 137 (2002); New York v. FERC, 535 U.S. 1 (2002); *see also* United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836 (2012) (offering some disagreement among the justices regarding relationship among *Mead*, *Chevron*, and stare decisis, but deciding the case at *Chevron* Step One and not disagreeing that Treasury Department regulations are ordinarily *Chevron*-eligible); Smith v. City of Jackson, 544 U.S. 228 (2005) (plurality of eight participating justices).

176. *See supra* notes 100–18 and accompanying text (illustrating the Supreme Court's occasionally rote application of the decision tree model).

grant of authority to adopt legally binding pronouncements either through notice-and-comment rulemaking or through formal adjudication.[177] Treating *Mead*'*s* first step as a statute-by-statute inquiry not only comports with the Supreme Court's decision in *City of Arlington*,[178] but seems also to have been the instinct of many circuit courts in cases before that and, in conjunction with stare decisis, vastly simplifies *Mead* Step One. In fact, because many if not most agencies are repeat players in litigation before the circuit courts, courts often just cite existing precedent to support *Chevron* versus *Skidmore* review of particular actions by particular agencies,[179] or even skip *Mead*'s two steps altogether.[180]

As regards *Mead*'s second step, many circuit courts in practice seem quite simply to extend *Chevron* review to the notice-and-comment regulations and formal adjudications mentioned in *Christensen* and *Mead*[181] or those informal adjudications for which the Supreme Court has expressly extended *Chevron* deference in other cases,[182] and to offer only *Skidmore*

177. *See, e.g.*, McMaster v. United States, 731 F.3d 881, 891 & n.3 (9th Cir. 2013) (pointing to statutory rulemaking grant as satisfying *Mead's* first step); Wilderness League v. EPA, 727 F.3d 934, 937 (9th Cir. 2013) (stating that EPA regulation promulgated under a statutory grant of authority is accorded *Chevron* deference).

178. *See supra* note 134 and accompanying text.

179. *E.g.*, Nat'l Treasury Emps. Union v. FLRA, 754 F.3d 1031, 1041 (D.C. Cir. 2014) (citing Nat'l Treasury Emps. Union v. FLRA, 414 F.3d 50, 57 (D.C. Cir. 2005), in favor of *Chevron* deference for FLRA interpretation of the Federal Service Labor-Management Relations Statute); Akram v. Holder, 721 F.3d 853, 858–59 (7th Cir. 2013) (citing Escobar v. Holder, 657 F.3d 537, 542 (7th Cir. 2011), as supporting *Chevron* deference for precedential Board of Immigration Appeals opinions interpreting the Immigration and Nationality Act); Lockheed Martin Corp. v. Dep't of Labor, 717 F.3d 1121, 1131 (10th Cir. 2013) (citing *Mead* as well as Trimmer v. Dep't of Labor, 174 F.3d 1098 (10th Cir. 1999), as supporting *Chevron* deference for Administrative Review Board formal adjudications interpreting whistleblower protection provisions of Energy Reorganization Act of 1974).

180. *E.g.*, CSX Transp., Inc. v. Surface Transp. Bd., 754 F.3d 1056, 1063 (D.C. Cir. 2014) (extending *Chevron* review to Surface Transportation Board regulations without discussing *Mead*); RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC, 754 F.3d 380, 384 (6th Cir. 2014) (extending *Chevron* review without elaboration to regulations promulgated under express grant of rulemaking authority contained in the Equal Credit Opportunity Act).

181. *See, e.g.*, Lopez v. Terrell, 654 F.3d 176, 182–83 (2d Cir. 2011) (declining to defer to Bureau of Prisons Administrative Remedy Program Letter for lack of notice and comment); Freeman v. Quicken Loans, Inc., 626 F.3d 799, 805–06 (5th Cir. 2010) (rejecting *Chevron* deference for a Department of Housing and Urban Development policy statement for lack of notice and comment); Bradley v. Sebelius, 621 F.3d 1330, 1338 & n.18 (11th Cir. 2010) (rejecting Department of Health and Human Services (HHS) claim to *Chevron* deference for Medicare field manual lacking notice and comment); Kornman & Assocs. v. United States, 527 F.3d 443, 452–53 (5th Cir. 2008) (declining to extend *Chevron* deference for Internal Revenue Service revenue rulings principally due to their lack of notice-and-comment rulemaking).

182. For example, as noted in *Mead*, the Court previously has deferred to informal adjudications by the Officer of the Comptroller of the Currency interpreting the National Bank Act. United States v. Mead Corp., 533 U.S. 218, 231–32 (2001) (citing NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995)). Since then, at least one circuit court has followed suit explicitly because of that precedent. *See, e.g.*, TeamBank, N.A. v. McClure, 279 F.3d 614, 619 (8th Cir. 2002) (declaring Office of the Comptroller of the Currency adjudication as an "exception" from the "general rule" of giving *Chevron*

respect to virtually any other sort of agency action.[183] This approach to *Mead*'s second step is not quite doctrinally accurate, as the Court expressly warned against limiting *Chevron*'s scope in this way in *Mead* and *Barnhart*.[184] Nevertheless, generally limiting eligibility for *Chevron* deference to notice-and-comment rulemaking and formal adjudications dramatically simplifies *Mead*'s application. Again, except for a few instances of not-quite-formal adjudications, the Court has never actually applied *Mead* to extend *Chevron* deference otherwise. Consequently, lower courts with busy dockets may well anticipate that the Court is unlikely to apply *Mead* differently very often, irrespective of the Court's occasional rhetoric to the contrary. Whether or not such an assumption is accurate, it also serves to simplify *Mead*'s application substantially.

B. Hard Cases

Even circuit court opinions that pursue a more nuanced treatment, however, often follow a decision tree–type approach. For example, one emerging trend in the circuit courts is to address deference for informal guidance by folding Justice Breyer's dicta in *Barnhart v. Walton* into the analysis of *Mead* Step Two, after the reviewing court already has concluded that Congress gave the agency the power to act more formally through notice-and-comment rulemaking or formal adjudication. For example, in *Fournier v. Sebelius*,[185] the Ninth Circuit evaluated whether an interpretation of the Medicare Act expressed in a policy guidance letter and the Medicare Benefit Policy Manual and implemented through Medicare Appeals Council adjudications was eligible for *Chevron* review.[186] The court concluded first that the statute was ambiguous regarding the interpretive question at issue.[187] The court then held that the Department of Health and Human Services, under whose authority the interpretations were made, clearly satisfied *Mead*'s first step, as the Secretary possesses general rulemaking authority over the Medicare Act.[188] To evaluate *Mead*'s second step, the court brought into play Justice Breyer's language from *Barnhart v. Walton*, characterizing the interpretation as (1) "interstitial"; (2) important to the agency's administration of a complex statute; and (3) longstanding and consistent, thus worthy of *Chevron* deference.[189] Finally, the court

deference to only agency actions with "'relatively formal' administrative procedures" because of *NationsBank*).

183. *E.g.*, S. Rehab. Grp., PLLC v. Sec'y of Health & Human Servs., 732 F.3d 670, 685 (6th Cir. 2013) (Medicare Claims Processing Manual); Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund, 724 F.3d 129, 140 (1st Cir. 2013) (Pension Benefit Guaranty corporation appeals letter); Vulcan Constr. Materials, LP v. FMSHRC, 700 F.3d 297, 316 (7th Cir. 2012) (Department of Labor litigating position); Lopes v. Dep't of Soc. Servs., 696 F.3d 180, 187–88 (2d Cir. 2012) (HHS amicus brief).

184. *See supra* notes 46–55, 75–80 and accompanying text.

185. 718 F.3d 1110 (9th Cir. 2013).

186. *Id.* at 1118.

187. *Id.* at 1118–19.

188. *Id.* at 1119–20.

189. *Id.* at 1120–22.

turned to the reasonableness of the interpretation at *Chevron* Step Two.[190] In *Hagans v. Commissioner of Social Security*,[191] the Third Circuit applied a similarly tiered approach to conclude that a Social Security Acquiescence Ruling was eligible only for *Skidmore* review before rejecting the interpretation contained therein as poorly explained.[192]

Nevertheless, the opening for nuance that *Barnhart* provides, particularly when combined with the Court's rhetorical inconsistencies, makes some disagreement about *Mead*'s application inevitable. For example, although the Court has made clear that decisions of the Board of Immigration Appeals (BIA) carry the force of law and are *Chevron*-eligible, the circuit courts have struggled to determine whether the same is true for interpretations designated by the BIA as nonprecedential. The Seventh Circuit initially extended *Chevron* deference to such interpretations.[193] Other circuits have accorded only *Skidmore* review,[194] prompting the Seventh Circuit subsequently to change its mind.[195] Meanwhile, still other circuits have reserved the question.[196] Similarly, the Court's refusal to opine definitively has allowed space for the Ninth Circuit to give *Chevron* deference to EEOC Compliance Manual interpretations of Title VII,[197] even as other circuits have declined to do so.[198]

Moreover, even a more nuanced version of the decision tree model is sufficiently rigid that it arguably leads to questionable resolutions of some issues of *Mead*'s applicability and *Chevron*'s scope. Indeed, it is in these instances that the decision tree most clearly resembles the "ugly and improbable structure" of which Justice Scalia has complained.[199]

In other work, I have documented the troubling examples of temporary Treasury regulations adopted without good cause and only post-promulgation notice and comment procedures, as well as IRS guidance documents that lack notice-and-comment rulemaking but nevertheless potentially subject taxpayers to penalties for noncompliance.[200] Often, the Treasury Department and IRS use these formats in reacting to transactions or litigation positions to which they object, raising concerns about arbitrariness.[201] Treasury and the IRS clearly possess the authority to act

190. *Id.*
191. 694 F.3d 287 (3d Cir. 2012).
192. *Id.* at 303.
193. *See* Gutnik v. Gonzales, 469 F.3d 683, 689–90 (7th Cir. 2006).
194. *See* Cordoba v. Holder, 726 F.3d 1106 (9th Cir. 2013); Dhuka v. Holder, 716 F.3d 149 (5th Cir. 2013); Quinchia v. Att'y Gen., 552 F.3d 1255, 1258–59 (11th Cir. 2008).
195. Arobelidze v. Holder, 653 F.3d 513, 520 (7th Cir. 2011).
196. *E.g.*, Dobrova v. Holder, 607 F.3d 297, 300 (2d Cir. 2010); Cervantes v. Holder, 597 F.3d 299, 233 n.5 (4th Cir. 2010).
197. *E.g.*, Nilsson v. City of Mesa, 503 F.3d 947, 953 n.3 (9th Cir. 2007).
198. *See, e.g.*, Townsend v. Benjamin Enters., Inc., 679 F.3d 41 (2d Cir. 2012); Noviello v. City of Boston, 398 F.3d 76 (1st Cir. 2005); Ebbert v. DaimlerChrysler Corp., 319 F.3d 103 (3d Cir. 2003).
199. United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1847 (2012) (Scalia, J., concurring).
200. Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465 (2013).
201. Leandra Lederman, *The Fight Over "Fighting Regs" and Judicial Deference in Tax Litigation*, 92 B.U. L. REV. 643 (2012).

with the force of law and assert the right to assess penalties for noncompliance with either format.[202] After years of claiming *Chevron* deference for both temporary Treasury regulations and IRS guidance documents, the IRS now accepts *Skidmore* review for the latter.[203] The circuit courts have struggled with both positions.[204]

A doctrinally faithful application of the decision tree model more likely leads to *Chevron* review for temporary Treasury regulations and IRS guidance documents.[205] That conclusion is arguably troubling because of the lack of procedure attending those otherwise routine IRS actions. Applying the *Skidmore* standard rather than *Chevron* might seem more appropriate in the abstract, giving reviewing courts greater flexibility to take into account both formats' admittedly arguable procedural failings. Under the decision tree model, however, such an outcome would be doctrinally inaccurate.

In short, applying the decision tree model of *Mead*, *Chevron*, and *Skidmore* to these more challenging circumstances is awkward. Justice Breyer's more fluid approach to judicial deference doctrine might yield a more satisfying outcome.

CONCLUSION

The point of this Essay is not to suggest that the Court's *Mead* jurisprudence is crystal clear and flawless. The justices' shifting rhetoric makes its adherence to and application of *Mead* seem much more fickle than it is and, further, is highly frustrating to lower court judges, litigants, and commentators who seek consistency in the Court's guidance. Hard cases exist and contribute to the sense of doctrinal uncertainty surrounding *Mead*.

Yet Supreme Court jurisprudence is often challenging in this way. The Court's job is to take the hard cases that present novel doctrinal challenges. Standards of review are not precise instruments in any event. Consequently, the Court's vacillating rhetoric and the justices' different views regarding *Mead* in marginal cases do not necessarily mean that *Mead* is a failed doctrine—particularly when the justices agree substantially more often than they disagree.

Moreover, as this Essay demonstrates, there is some method in the madness. Even if the Court collectively is somewhat inconsistent in its rhetoric, individual justices are more predictable. And notwithstanding the Court's rhetorical inconsistency and occasional difficulties in applying *Mead*, the courts seem to have made *Mead* work more consistently across a majority of cases than *Mead*'s critics contend. That relative consistency thus far seems to be an improvement over the doctrinal mess regarding

202. Hickman, *supra* note 200, at 526–29.
203. *Id.* at 501–02, 507–08.
204. *Id.*
205. *Id.* at 529.

Chevron's scope that existed prior to *Mead*. Perhaps that ought to be enough.